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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES SPALDING, et al., Petitioners,

v.

ARTHUR NATHANIEL AIKEN, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 9(a) governing § 2254 state prisoner habeas petitions, "prejudice" in the state's "ability to respond to the petition" must be limited to the state's ability to meet the allegations of the petition, where under parallel Rule 9(a) with identical language governing § 2255 federal prisoner petitions, "prejudice" is construed to include impairment of ability to retry the case.

2. Whether a state may suffer "prejudice" sufficient to warrant dismissal of a delayed petition under Rule 9(a) governing § 2254 state prisoner habeas petitions, where a prisoner's delay in filing the petition has seriously prejudiced any retrial of the case.

3. Absent a showing of manifest injustice relating to guilt or innocence, should the federal courts seventeen

years after conviction collaterally review a state prisoner's habeas claims which have been reviewed on direct state court appeal and twice presented to the United States Supreme Court a decade earlier?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Habeas petitioner Arthur Nathaniel Aiken named as respondents: James Spalding, former Superintendent of the Washington State Penitentiary; and Ken Eikenberry, Attorney General of the State of Washington.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of All Parties to the Proceeding	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Federal Rules Involved	2
Statement of the Case	3
Reasons for Granting the Writ	10
Conclusion	28
Appendix A -- Ninth Circuit Opinion Below	1a-7a
Appendix B -- District Court Order and Opinion Below	8a-12a
Appendix C -- Excerpt of Washington Supreme Court Opinion	13a-36a
Appendix D -- Historical Note and Advisory Committee Note to Rule 9(a) Governing Section 2254 Proceedings	37a-47a
Appendix E -- Advisory Committee Note to Rule 9(a) Governing Section 2255 Proceedings ...	48a-36a

TABLE OF AUTHORITIES

Cases

	Page
Aiken v. Spalding, 684 F.2d 632 (9th Cir. 1982)	1,20
Black v. Coombe, 506 F.Supp. 626 (S.D.N.Y. 1981), affirmed without opinion, 672 F.2d 899 (2d Cir. 1981)	22
Bruton v. United States, 391 U.S. 123 (1968)	5,6
Desmond v. United States, 333 F.2d 378 (1st Cir. 1964) ...	23
Engle v. Isaac , ___ U.S. ___, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)	11,25
Francis v. Henderson, 425 U.S. 536 (1976)	23
Honeycutt v. Ward, 612 F.2d 36 (2d Cir. 1979)	16
McDonald v. Estelle, 666 F.2d 246 (6th Cir. 1982)	16
Rose v. Lundy, ___ U.S. ___, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982)	25
State v. Aiken, 72 Wn.2d 306, 434 P.2d 10 (1967), rev'd. Aiken v. Washington, 403 U.S. 946 (1971)	4,6
State v. Aiken, 75 Wn.2d 421, 452 P.2d 232 (1969), rev'd. Wheat v. Washington, 392 U.S. 652 (1968)	5,6

Page

Sumner v. Mata, 449 U.S. 539 (1981) 25

United States v. Frady, ___ U.S. ___, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1972) 11,23

United States v. Wiggins, 184 F.Supp. 673 (D.D.C. 1960) .. 23

Witherspoon v. Illinois, 391 U.S. 510 (1968) 391

Statutes And Rules

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 7,24

Rule 9(a), Rules Governing Section 2254 Proceedings, 28 USC foll. § 2254 ..... 2,8,9,14, 15,16,18,19,20,21

Rule 9(a), Rules Governing Section 2255 Proceedings, 28 USC foll. § 2255 ..... 2,9,10, 14,15,18,19

Other Authorities

American Bar Association Journal, October 1987 26

American Bar Association Standards Relating to Post-Conviction Remedies, § 2.4 (Approved Draft (1968)) 16,17, 18,21

W. WILKINS, THE SWORD AND THE GAVEL, (Morse Press Seattle, 1981) 6

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Aiken v. Spalding is reported at 684 F.2d 632 (9th Cir. 1982) and is reproduced in Appendix A (1a-7a). The Ninth Circuit reversed the Order Granting Respondent's Motion To Dismiss the petition for writ of habeas corpus entered by the United States District Court for the Western District of Washington. The district court's order is reproduced in Appendix B (8a-12a).

JURISDICTION

The opinion of the court of appeals was entered on August 17, 1982.

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 9(a) of the Rules Governing Section 2254 Proceedings, 28 U.S.C. foll. § 2254 (1976):

> **(a) Delayed petitions.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(Historical Note and Advisory Committee Note are reproduced in Appendix D, 37a-47a.)

Rule 9(a) of Rules Governing Section 2255 Proceedings, 28 U.S.C. foll. § 2255 (1976):

> **(a) Delayed motions.** A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(Advisory Committee Note is reproduced in Appendix E, 48a-53a.)

STATEMENT OF THE CASE

On October 14, 1965, a jury in King County, Washington, found Arthur Nathaniel Aiken and his co-defendant, Antonio Nathaniel Wheat, guilty of three counts of murder in the first degree for the robbery/slayings of three gas station attendants in separate incidents within one month. Each victim was shot several times, one as he prayed for mercy. The jury imposed the death penalty.

On direct appeal to the Supreme Court of Washington, Aiken raised numerous issues, including the claims now raised in his petition for writ of habeas corpus: voluntariness of confession, pretrial publicity, and severance.

Following a remand to the trial court for further evidentiary hearing on the confession issue, the Washington

Supreme Court found that the record fully supported the trial court's findings of fact: Although Aiken at least twice requested counsel, the request was not audible and not heard by the police. The court found that Aiken gave his statements voluntarily and intelligently in response to his requested confrontation with co-defendant Wheat, who accused Aiken of the murders.

The court found that the news media successfully exercised remarkable restraint to avoid pretrial publicity, that Aiken had not been prejudiced and that the trial court had not abused its discretion in trying Wheat and Aiken jointly. On October 26, 1967, the Washington Supreme Court affirmed Aiken's conviction. State v. Aiken, 72 Wn.2d 306, 434 P.2d 10 (1967). (See excerpt at Appendix C, 13a-36a.)

On March 18, 1968, Aiken petitioned the United States Supreme Court for review by way of certiorari, raising the confession and severance issues, but not the pretrial publicity issue. S. Ct. No. 1535, Misc. On June 17, 1968, the United States Supreme Court summarily granted the petition, vacated the Washington Supreme Court judgment, and remanded for further consideration in light of Bruton v. United States, 391 U.S. 123 (1968), and Witherspoon v. Illinois, 391 U.S. 510 (1968). See Wheat v. Washington, 392 U.S. 652 (1968).

Following supplemental briefing and arguments, the Washington Supreme Court, inter alia, carefully analyzed each murder and defendants' relevant statements in light of Bruton and again found the joint trial proper. On March 6, 1969, the court again affirmed the

convictions and penalties. State v. Aiken, 75 Wn.2d 421, 431-7, 452 P.2d 232 (1969).

On August 13, 1969, Aiken petitioned the United States Supreme Court for review by way of certiorari a second time, again raising the confession and Bruton severance issues, but not the pre-trial publicity issue. S.Ct. No. 5065 On June 28, 1971, the Supreme Court summarily granted the petition, vacated the death penalty and remanded. Aiken v. Washington, 403 U.S. 946 (1971).

Feeling that "neither Wheat nor Aiken should ever be released," on November 29, 1971, the state court trial judge resentenced Aiken and Wheat to three consecutive life prison terms. Three consecutive life sentences would bring parole in about forty years. W. WILKINS, THE SWORD AND THE GAVEL, (Morse Press Seattle, 1981), p. 293. At all

times throughout the state court and United States Supreme Court proceedings, Aiken was represented by able counsel.

On July 26, 1979, fourteen years after his original conviction, Aiken filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Washington. He based his petition on the publicity issue, and the confession and severance issues which he had last raised a decade earlier in the Washington State and United States Supreme Courts.

On February 22, 1980, the district court dismissed the petition because Aiken had delayed more than five years after conviction in filing the petition. The court ruled that Aiken's claim of waiting for assistance from legal aid lawyers was insufficient to overcome the presumption of prejudice to the state. On August 5, 1980, the Ninth Circuit

Court of Appeals summarily reversed and remanded because: (1) Rule 9(a) of the Rules Governing § 2254 Proceedings had omitted the five-year delay presumption of prejudice; and (2) the district court had made no factual finding that the state was actually prejudiced by the delay.

On remand the State of Washington presented evidence that it could locate only 30 of the 87 witnesses who originally testified at trial, that several critical prosecution witnesses could not be located, and that without them, the state would be unable to tie the gun to the defendants, to tie the bullets in the victims' bodies to the defendants' gun, and to establish the defendants' presence at the scenes of the murders. The state also made a showing that 136 of the 138 exhibits offered by the state at trial fifteen years earlier had been lost or destroyed, including guns,

bullets, victims' clothing, photographs, and diagrams.

The United States District Court dismissed Aiken's petition on the basis of Rule 9(a) of the Rules Governing Section 2254 Proceedings, 28 U.S.C. foll. § 2254, codifing the equitable doctrine of laches. The district court found that: (1) The state had been prejudiced in its ability to retry the case as a result of Aiken's delay in renewing his claims; and (2) there was no reasonable excuse for Aiken's delay since he had known of these claims and had raised them in the state courts as early as 1965. The district court held that Rule 9(a) § 2254 encompasses prejudice in the state's ability to retry a state prisoner just as similarly worded Rule 9(a) § 2255 encompasses prejudice in the federal government's ability to retry a federal prisoner. Appendix 12a.

Aiken appealed. The Ninth Circuit Court of Appeals reversed, interpreting Rule 9(a) § 2254 in a rigidly literal manner to include prejudice only in the state's ability to meet the allegations of the petition. The court totally rejected any possibility in any case of considering prejudice in the state's ability to retry the case as a ground for dismissal of a state prisoner's habeas petition under Rule 9(a) § 2254. The court remanded to the district court to consider the merits of Aiken's petition. Appendix 6a. The state now seeks review of that decision.

REASONS FOR GRANTING THE WRIT

In reversing the district court's dimissal of an unreasonably delayed petition, the court of appeals has expanded the availability of federal habeas relief for state prisoners. According to the circuit court, a state conviction is

forever open to collateral attack in the federal courts: regardless of the scope of prior state appellate and United States Supreme Court review, regardless of the prisoner's delay in thereafter seeking habeas relief, regardless of the resulting prejudice to the state's ability to retry the case, and regardless of the potential bar to relief for federal prisoners in like circumstances.

This Court recently held that habeas relief is not available to federal and state prisoners whose ignorance of and failure timely to raise constitutional claims were inexcusable. United States v. Frady, ___ U.S. ___, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1972), and Engle v. Isaac, ___ U.S. ___, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982), respectively. The circuit court in this case, however, makes habeas relief continuously available to a state prisoner who previously

identified and raised his constitutional claims at trial, in the state supreme court, and in the United States Supreme Court. The fact that such prisoner thereafter delayed eight years in renewing his claims in federal court, rendering any effective retrial impossible, is deemed irrelevant.

The state court had originally sentenced Aiken to die for his part in the brutal triple murders. The United States Supreme Court ruled the death penalty unconstitutional and remanded. The state trial judge, of the opinion that Aiken was so dangerous that he should never be released, imposed three consecutive life sentences. The circuit court's ruling defeats the argument of death penalty opponents that life imprisonment is a meaningful alternative to capital punishment for those criminals too dangerous to return to society. The effect of the circuit court's ruling is

that as long as a state prisoner remains alive, his sentence is not final and the state must be constantly prepared to retry the case.

The most serious offenders will reap the most benefits from the circuit court's new rule, and the public will suffer the dangerous consequences of such open-ended redress to the writ of habeas corpus. Those convicted of the most serious crimes will generally acquire the longest sentences. The longer the sentence and the greater the delay in filing a habeas petition, the less effective will be the state's effort to retry the case. Accordingly, the federal courts will order a state prisoner's release or retrial: (1) in spite of his delay in filing his petition, and (2) without regard to the state's ability to retry the case years after the original conviction had been presumed final. Under this new rule the

lower federal courts are thus permitted to sit as "super courts," reviewing state court judgments, unfettered by the sensible time requirements normally accompanying direct appeals. To allow such perpetual collateral review violates the principles of finality of judgments, laches, and comity between the state and federal judiciaries, and deeply undercuts the states' administration of their criminal justice systems.

1. "Prejudice" In The State's "Ability To Respond To The Petition" Under Rule 9(a) Governing § 2254 State Prisoner Habeas Petitions Should Be Construed To Include Prejudice In The State's Ability To Retry The Case, Consistent With Parallel Rule 9(a) Governing § 2255 Federal Prisoner Post-Conviction Proceedings.

In 1976, upon the recommendation of the Judicial Conference of the United States Supreme Court, Congress incorporated the equitable doctrine of laches into the rules governing state prisoner habeas corpus petitions and the federal

prisoner analogue. Both rules use identical language:

> A [petition/motion for relief made pursuant to these rules] may be dismissed if it appears that [the state /the government] has been prejudiced in its ability to respond to the [petition/motion] by delay in its filing. . . .

Rule 9(a) of the Rules Governing § 2254/ § 2255 Proceedings, 28 U.S.C. foll. § 2254/§ 2255, respectively. (For full text, see p. 2 of this petition.) Advisory Committee Notes accompany each section. They are reproduced in Appendices D and E, respectively (37a-47a, 48a-53a).

The Advisory Committee Note to Rule 9(a) governing § 2255 motions expressly includes governmental retrial prejudice as a ground for denying relief to the federal prisoner:

> Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims so as to prejudice the government both in meeting

> the allegations of the motion and in any possible retrial.

(Emphasis added.) (Appendix E, 52a).

The Advisory Committee Note to Rule 9(a) governing state prisoner § 2254 petitions does not explicitly mention retrial prejudice. However, the Note does explain that:

> This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims. . . .

(Appendix D, 37a). Accord, McDonald v. Estelle, 666 F.2d 246, 250 (6th Cir. 1982); Honeycutt v. Ward, 612 F.2d 36 (2d Cir. 1979).

The Advisory Committee Note further indicates that Rule 9(a) governing § 2254 cases was structured in accord with ABA Standards Relating To Post-Conviction Remedies (Approved Draft (1968)). (Appendix D, 39a, 40a, 42a, 46a). These Standards specifically mentioned governmental inability to reprosecute as a factor to consider in

determining whether to deny relief to a prisoner who has delayed filing his petition:

> It should be considered an abuse of process for a person with tenable or meritorious claim for post-conviction relief deliberately and knowingly to withhold presentation of that claim until an event occurs which he believes prevents successful re-prosecution or correction of the vitiating error. An applicant who has committed such abuse of process may be denied relief on his claim. . . .

ABA Standards Relating To Post-Conviction Remedies, § 2.4(b), (Approved Draft (1968)). (Emphasis added.)

Similarly, the commentary to the ABA draft standards addressed the problem of prisoners who wait until effective reprosecution is impossible before filing their post-conviction petitions:

> One form of abuse said to exist is that of prisoners knowing that they have valid claims for relief, intentionally foregoing presenting those claims until the evidence of guilt has dissipated so that reconviction would be impossible. That is provided for in this section.

ABA Standards for Post-Conviction Remedies, § 2.4, Commentary, p. 47 (Approved Draft 1968). (Emphasis added.)

The district court's interpretation of Rule 9(a) § 2254 is consistent with these ABA Standards on Post-Conviction Remedies (Approved Draft (1968)) and the Advisory Committee Notes accompanying both Rules 9(a) Governing Section 2254 and 2255 Proceedings. Finding no persuasive reason for interpreting differently the two parallel rules with identical language concerning "prejudice," the district court below properly construed Rule 9(a) Governing Section 2254 Proceedings to include prejudice in the state's ability to retry the case. (Appendix B, 12a). The court found that state prisoner Aiken had unreasonably delayed in filing his petition to the detriment of the state, which was no longer able to retry the case effectively. Accordingly, the district court

exercised its Rule 9(a) § 2254 discretion and dismissed the petition. (Appendix B, 10a-11a).

On appeal, however, the Ninth Circuit Court of Appeals read Rule 9(a) Governing § 2254 Proceedings in a manner overly literal and contrary to established interpretation of Rule 9(a) governing federal prisoner § 2255 proceedings. Reluctant to limit availability of the "great writ," and noting no express inclusion of prejudice in the state's "ability to retry the case," the court limited "prejudice in the state's ability to respond to the petition" to the state's ability to meet the claims of the petition. (Appendix A, 4a). In a specially concurring opinion, Judge Poole agreed with the majority's literal interpretation of the rule but expressed his strong opinion that:

> . . . the Rule as interpreted does not conform to the realities of the criminal justice system.

> It seems utterly unrealistic to suggest that the state may raise the prejudice it has suffered in responding to the petition caused by petitioner's delay, but that it may not raise the prejudice it will suffer in attempting to retry the underlying charges against him. The principles of equitable estoppel animating Rule 9 apply equally well to the difficulties faced by the state in any retrial as to any problems it may have in responding to petitioner's specific claims. Indeed, as demonstrated by this case, the difficulties involved in marshalling evidence for a retrial, including dispersal of witnesses, faulty memory and unwillingness to testify may often be more significant than the task of meeting petitioner's specific allegations.

Aiken v. Spalding, 684 F.2d at 634, (Appendix A, 6a).

As noted by Judge Poole, when a prosecution witness dies or loses his memory of key facts, the state suffers, regardless of whether that witness was needed to rebut a convicted prisoner's claim of constitutional error or to reprove the prisoner's guilt upon retrial. Other than its literal reading of Rule 9(a), the circuit court offers no explanation for why an impaired ability

to reprosecute should be considered any less "prejudicial" than an impaired ability to meet an allegation of constitutional error.

In determining the scope of Rule 9(a) § 2254, much reliance must be placed upon the realities of the criminal justice system, the Rule 9(a) § 2254 Advisory Committee Note and the draft ABA Standards upon which Rule 9(a) was based. Case law interpreting whether the new rule encompasses prejudice on retrial is scant.

The Ninth Circuit is the first to attempt interpretation of this facet of the rule. Not only has the circuit court in this case ignored the Advisory Committee Note and draft ABA Standards, but also it has misconstrued Rule 9(a) of the Rules Governing Section 2254 Proceedings to reach an absurd result. Its opinion conflicts with dicta from the Southern District of New York in

Black v. Coombe, 506 F.Supp. 626 (S.D.N.Y. 1981), affirmed without opinion, 672 F.2d 899 (2d Cir. 1981). This Court should take this opportunity to settle this important question of federal law.

2. Absent Manifest Injustice Relating To Guilt Or Innocence, Principles Of Laches, Comity And Finality Should Prevent Federal Courts From Reviewing State Prisoner Habeas Claims Which Have Been Last Reviewed By The Highest State Court And Presented To The United States Supreme Court A Decade Earlier.

The Ninth Circuit has unrealistically expanded the availability of habeas corpus relief to state prisoners beyond that available to federal prisoners. If retrial prejudice occasioned by delay in asserting claims can bar post-conviction relief to federal prisoners, then sensible principles of comity and federalism should impose a similar bar to relief sought by dilatory state prisoners. See

Desmond v. United States, 333 F.2d 378, 381 (1st Cir. 1964); United States v. Wiggins, 184 F.Supp. 673, 676 (D.D.C. 1960).

> Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations. Kaufman v. United States, 394 US 217, 28, 22 L Ed 2d 227, 89 S Ct 1068.

Francis v. Henderson, 425 U.S. 536, 542 (1976).

Only months ago this Court acted to equalize state and federal prisoner rights:

> On balance, we see no basis for affording federal prisoners a preferred status when they seek post-conviction relief.

United States v. Frady, ___ U.S. ___, 102 S. Ct. 1584, 1593, 71 L. Ed. 2d 816, 829 (1982). The Court balanced the competing equities involved in state

prisoner § 2254 habeas petitions and ultimately held that a prisoner's identification of a constitutional error does not necessarily warrant relief at the expense of these other equities:

> Today, as in prior centuries, the writ is a bulwark against convictions that violate "fundamental fairness."
>
> We have always recognized, however, that the Great Writ entails significant costs. Collateral review of a conviction extends the ordeal of trial for both society and the accused. As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation. . . . [W]rits of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.
>
> Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional

> rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights. . . .

Engle v. Isaac, ___ U.S. ___, 102 S. Ct 1558, 1570-71, 71 L. Ed. 2d 783, 799-800 (1982).

Implicit in these and other recent Supreme Court habeas cases is the recognition that state courts have made great strides in the protection of federal rights. See, e.g., Sumner v. Mata, 449 U.S. 539 (1981) and Rose v. Lundy, ___ U.S. ___, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). As recognized in Engle v. Isaac, indiscriminate federal intrusions undermine morale and demean the ability of the state courts to identify and correct constitutional errors on their own. Engle v. Isaac, supra, n. 33. Federal intrusion is especially devastating in this case where a decade ago the state courts painstakingly examined,

both on direct review and on remand from this United States Supreme Court, the same claims now raised in the federal habeas petition. Moreover, federal review is not always essential or possible. The caseload has increased so drastically that the federal courts are not physically capable of reviewing every state prisoner petition. As Justice Powell declared at the 1982 ABA Annual Meeting:

> [T]he time has come for considering means of limiting collateral review by federal courts of state convictions to cases of manifest injustice -- where the issue is guilt or innocence.

American Bar Association Journal, October 1987, p. 1202.

Summary denial of state habeas petitions would work no "manifest injustice" upon prisoners such as Aiken, whose constitutional claims were fully reviewed twice by the highest state court, and once on remand from this

Court. But a manifest injustice will be wrought upon the state and its citizens if Aiken's claims are again reviewed at this late date. An injustice not only manifest but shocking to the conscience will be wrought upon the citizens of the State of Washington if the state is forced to release this clearly guilty triple murderer, seventeen years after conviction; effective reprosecution is no longer possible due to Aiken's delay in renewing his claims in federal court and the state's consequent reliance upon the finality of his conviction following this Court's last remand.

The federal courts should not be permitted to fashion different rules for state and federal prisoners where the fabric of the applicable rules governing federal post-conviction relief for state and federal prisoners is identical. Nor should the federal courts be permitted

to intrude so deeply upon the state's right to protect its citizens.

CONCLUSION

For these reasons a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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